

FILE COPY *Sup. Ct. Filed*

JUN 6 1947

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. **451** 112

BENJAMIN WEBER, JAMES ELLIS and SIMON BIRK,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals,
Eighth Circuit,
and

SUPPORTING BRIEF.

JOHN W. GIESECKE,
706 Chestnut Street,
St. Louis 1, Missouri,
Attorney for Petitioners.

Of Counsel:

ACKERT, GIESECKE & WAUGH,
706 Chestnut Street,
St. Louis 1, Missouri.



INDEX.

	Page
Petition for writ of certiorari.....	1-8
Summary statement of matter involved.....	1
Statement disclosing basis of jurisdiction.....	5
Questions presented	6
Reason relied on for the allowance of the writ.....	7
Brief in support.....	9-18
The opinion of the court below.....	9
Jurisdiction	9
Statement of the case.....	10
Specification of errors.....	11
Argument	13

Cases Cited.

Furness, Withy Co., Ltd., v. Lang-Tsze Insurance Assoc., Ltd., 242 U. S. 430.....	7
Gunning v. Cooley, 281 U. S. 90, 98.....	7
Matter of A. J. Tower, 60 N. L. R. B. 1414.....	17
Matter of Burlington Mills, 56 N. L. R. B. 365, 368....	17
N. L. R. B. v. Standard Lime, 149 F. (2d) 435, cert. denied 326 U. S. 723, 90 L. Ed. 429.....	5, 15, 17
N. L. R. B. v. Tower Co., 91 L. Ed. 245, ... U. S.	5, 7, 13, 16
Pittsburgh Plate Glass v. N. L. R. B., 313 U. S. 146, 85 L. Ed. 1251	4
Weber et al. v. N. L. R. B., 160 F. (2d) 388.....	1, 9

Statutes Cited.

Administrative Procedure Act, 5 U. S. C. A.—Pocket Supp.—Sec. 1009 (c)	13, 14
Judicial Code, Sec. 240, as amended by Act of Feb- ruary 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347..	6
National Labor Relations Act, adopted July 5, 1935, Chap. 372, Sec. 16, 49 Stat. 457, 29 U. S. C. A., Sec- tions 151 to 166	1, 11, 12, 13, 15

Miscellaneous Citations.

33 American Bar Association Journal 516, May, 1947 (column 3)	13
12 Missouri Law Review, l. c. 10.....	16
Ninth Amendment to the Constitution of the United States	7, 11, 15

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No.

BENJAMIN WEBER, JAMES ELLIS and SIMON BIRK,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI **To the United States Circuit Court of Appeals,** **Eighth Circuit.**

To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:

The petition of Benjamin Weber, James Ellis and Simon
Birk respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF MATTER **INVOLVED.**

This is a proceeding under the National Labor Relations
Act (commonly called the "Wagner Act") adopted July 5,
1935, Chapter 372, Section 16, 49 Stat. 457, 29 U. S. C. A.,
Sections 151 to 166, inclusive, against the Semi-Steel
Casting Company charging said Company is engaging in
certain unfair labor practices, in that said Company on

November 29, 1943, and at all times thereafter has refused to bargain collectively with the International Molders & Foundry Workers Union of North America, Local 59, A. F. L. (hereinafter called "the Union").

Pursuant to Notice of Hearing, Petitioners herein (Benjamin Weber et al.), in conformity with the Act prepared and filed their Motion to Intervene (Record 38), asserting, inter alia, that they were employees of the Company; opposed the union as their bargaining agent; that the Union did not win the election held on November 4, 1943; that as employees they were affected by any order requiring the Company to bargain with the Union; and that the actions of the National Labor Relations Board, as it affects these Petitioners, were without authority and violative of their constitutional guarantees under the Constitution of the United States, all as more fully set forth in their Answer to the Complaint (R. 40).

At the hearing, held May 1 and 2, 1944, these Petitioners duly moved the Trial Examiner to permit them to intervene and file their Answer in the proceeding, but on objection of counsel for the Board and on the ground "that the movants had no interest in the proceeding" the motion was denied (R. 68/9).

Thereafter, and on June 12, 1944, in due time, these Petitioners filed their exceptions (R. 53) to the ruling upon their Motion to Intervene and their Suggestions in Support. The Board, by its decision dated March 14, 1946, overruled the exceptions of these Petitioners and affirmed the Trial Examiner's ruling on the Motion to Intervene (R. 60/62). The Hon. Gerard D. Reilly filed his dissenting opinion expressing the view that the denial of the Motion to Intervene by the Trial Examiner on the ground these Petitioners "had no interest in the case constituted clear error" (R. 63/5).

Thereafter, and on April 13, 1946, in due time, these Petitioners filed their Petition for Review (R. 95/99) of the decision of the Board by the Eighth Circuit Court of Appeals. That Court affirmed the decision of the Board (Transcript 7) in an opinion filed March 13, 1947 (160 F. [2d] 388), which held that the dissenting employees, seeking intervention, were not necessary parties; and that the Board by its order requiring the Company to bargain with the Union did not thereby effectively exercise its power upon anyone but the Company. The effect of this holding was to find that the action of the Board and its examiner, in denying intervention to the complaining employees, was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and to find the dissenting employees were not directly affected by such a proceeding.

The petitioning employees at all times have denied the allegation of the Board that a majority of the employees had designated and selected the Union as their representative.

In reaching the conclusion that the Union is the duly elected bargaining representative, it was necessary for both the Board and the Circuit Court of Appeals to (1) estop the Company from asserting otherwise by reason of the terms of the Consent Election Agreement entered into by the Company, (2) deny the complaining employees, who would not be bound by the Election Agreement, the right to intervene, and (3) to then hold that in an election under the National Labor Relations Act the Union need only receive a majority of the valid (as determined by the Regional Director) votes cast, rather than a majority of the votes cast by qualified voters. In so holding, the Eighth Circuit ruled there was a question of Federal and not local law involved.

The basic question involved in the proceeding was whether the Union had ever been the duly elected bargaining agent, and on that determination depended the answer to the question whether the Company by its refusal to bargain was guilty of an unfair labor practice. The basic question, as stated, was properly in the case; see **Pittsburgh Plate Glass v. N. L. R. B.**, 313 U. S. 146, 85 L. Ed. 1251. The decision of the Eighth Circuit Court rests upon estoppel, but it passes upon the basic question and in so doing announces what these Petitioners believe to be erroneous principles of law, in conflict with the decisions of the Supreme Court of the United States and with those of other Circuit Courts of Appeal.

At the time of the election held pursuant to the Consent Election Agreement it was agreed there were 129 employees qualified to vote. Of this number 119 employees who were qualified voters, presented themselves at the election and voted. Of these votes, cast by qualified voters, the representative of the Regional Director, on her own motion and without challenge, placed two of them in her purse without showing them to the other observers. One of those ballots had the voter's name written on the part thereof wherein the square "No" appears (R. 19). On the other, the voter had placed an "X" in both the "Yes" and "No" squares. Of the remaining votes, 59 were for the Union and 58 against. So, briefly stated, the 129 eligible employees expressed themselves as follows:

- 10—not voting
- 1—voting clearly "No", but signing his ballot
- 1—voting to express indifference to the outcome
- 58—voting against the union
- 59—voting for the union

And the basic question for determination was, as said in **N. L. R. B. v. Tower Co., 91 L. Ed. 245**: "whether a majority in fact voted for the Union." By that statement of the question, does the Supreme Court mean a majority of the employees in the unit, or a majority of the qualified employees **voting**, or does it mean a majority of the valid votes cast? If the latter, then by what rule of law shall the validity of a vote be determined? In passing upon these questions the Circuit Court of Appeals has enunciated rules and doctrines in violation of those set forth in **N. L. R. B. v. Tower Co., 91 L. Ed. 245, ... U. S. ...**; and is in conflict with the decision of the U. S. Circuit Court of Appeals for the Fourth Circuit in **N. L. R. B. v. Standard Lime, 149 F. (2d) 435, cert. denied 326 U. S. 723, 90 L. Ed. 429**.

And is it arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, for the Board and its agent to deny intervention to a group of dissenting employees when their application was orderly presented by counsel, there were no other applications to intervene, and the company was estopped to urge any defense to the basic question involved?

B.

STATEMENT DISCLOSING BASIS OF JURISDICTION.

1. The original date of the Opinion entered in this case was March 13, 1947 (Transcript 7). On Motion to Enlarge Time within which to File Petition for Rehearing, the time therefor was extended by the Court to April 9, 1947 (Transcript 32). Petition for Rehearing was filed April 8, 1947 (Transcript 43), within the time provided for by the rules and orders of the United States Circuit Court of Appeals, and the Petition for Rehearing was denied April 21, 1947 (Transcript 45). Decree was entered April 26, 1947 (Transcript 17).

2. The jurisdiction of this Court is based upon Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. C. A., Title 28, Section 347.

C.

QUESTIONS PRESENTED.

1. Whether, in an unfair labor practice proceeding before the National Labor Relations Board, it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, to deny intervention to a group of dissenting employees whose application for intervention is orderly presented by counsel, there being no other persons or employees seeking intervention, and the employer is estopped by the provisions of a Consent Election Agreement to assert the Union was not the validly chosen bargaining representative.

2. Whether denial of intervention under the circumstances set forth in Question No. 1 above constitutes a denial of due process of law to the dissenting employees.

3. Whether, in determining if a bargaining representative has been chosen under the National Labor Relations Act, such representative must receive the votes of a majority of the employees in the unit, or of a majority of the qualified employees voting, or only a majority of the valid votes cast.

4. Whether the National Labor Relations Board is vested with discretion to determine its practice with respect to Question 3 above.

5. Whether, in determining the validity of a vote cast in a labor election under the National Labor Relations Act, the federal or local law shall apply.

6. Whether the order of the Board, affirmed by the Circuit Court of Appeals, requiring the Company to bargain

exclusively with the Union, violates and contravenes the Ninth Amendment to the Constitution of the United States of America, insofar as it affects the rights of Petitioners to bargain with the Company.

7. In the interest of brevity (Rule 38, para. 2; **Furness, Withy Co., Ltd., v. Lang-Tsze Insurance Assoc., Ltd.**, 242 U. S. 430), Petitioners do not at this time set forth all of the questions which will be urged in the argument on the merits of this cause should the writ be granted, nor all of the contentions in support of such questions, but in order to comply with the rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (**Gunning v. Cooley**, 281 U. S. 90, 98), Petitioners here refer to and incorporate into this petition all of the matters presented in their Petition to Review Order of the National Labor Relations Board relied upon on the appeal to the U. S. Circuit Court of Appeals for the Eighth Circuit (R. 95/101) with the same force and effect as if herein set out in full.

D.

**REASONS RELIED ON FOR THE ALLOWANCE
OF THE WRIT.**

1. Because the Opinion and Decree of the Circuit Court of Appeals for the Eighth Circuit in this case is in direct conflict with the decision of the Supreme Court of the United States in **N. L. R. B. v. Tower Co.**, ... U. S. ..., 91 L. Ed. 245.

2. Because the United States Circuit Court of Appeals for the Eighth Circuit has decided important issues in the administration of the National Labor Relations Act which have not been but should be settled by this Court.

E.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit herein applied for should be granted.

JOHN W. GIESECKE,
Attorney for Petitioners.

Of Counsel:

ACKERT, GIESECKE & WAUGH,
706 Chestnut Street,
St. Louis 1, Missouri.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No.

BENJAMIN WEBER, JAMES ELLIS and SIMON BIRK,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT.

I.

THE OPINION OF THE COURT BELOW.

The intermediate report of the Trial Examiner was dated May 23, 1944 (R. 66). The Decision of the National Labor Relations Board was entered March 14, 1946, and appears on Record pages 56 to 65. The Opinion of the Eighth Circuit Court of Appeals (written by Riddick, J.) was filed March 13, 1947, and appears in Transcript pages 7 to 17. It is reported in 160 F. (2d) 388.

II.

JURISDICTION.

The essential facts relative to the jurisdiction of this Court are fully stated in the accompanying petition for certiorari (*supra*, page 5) and in the interest of brevity are not repeated here.

III.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for certiorari (*supra*, page 1) and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument, which follows.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in sustaining the denial of intervention and in not finding such denial to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
2. The denial of intervention under the circumstances here present was contrary to constitutional right, or in excess of statutory authority, or short of statutory right.
3. The enforcement of the order of the Board by the decree of the Circuit Court of Appeals is violative and constitutes an abridgment of the Ninth Amendment to the Constitution.
4. The denial of intervention to Petitioners has denied them the due process of law guaranteed by the Constitution.
5. The Circuit Court of Appeals erred in holding that a bargaining representative may be selected under the National Labor Relations Act by less than a majority of the employees in the unit.
6. The Circuit Court of Appeals erred in holding that a bargaining representative may be selected under the National Labor Relations Act by less than a majority of the voting employees.
7. The Circuit Court of Appeals erred in holding that a bargaining representative may be selected under the National Labor Relations Act upon receiving a majority of the votes cast and found to be valid by the Regional Director, even though it is not a majority of all votes cast.

8. The Circuit Court of Appeals erred in holding neither the Fleming vote nor the twice marked ballot need be counted.

9. The Circuit Court of Appeals erred in holding that the validity of a vote in an election under the National Labor Relations Act shall be determined by the rules of the Board.

10. The Circuit Court of Appeals erred in affirming the decision of the National Labor Relations Board.

V.

ARGUMENT.

1.

Although Section 10 of the National Labor Relations Act [29 U. S. C. A., Sec. 160 (b)] specifically provides that in the discretion of the Board or its agents any person, other than the person complained of, may be allowed to intervene in a hearing on a charge of an unfair labor practice, not a single case has come to the attention of these Petitioners in which dissenting employees have sought intervention and been granted their request. There seem to be no standards by which dissenting employees may gauge their request, except what seems to be an inflexible rule of the Board, sustained by several Circuit Courts of Appeal, that dissenting employees are not necessary parties and intervention will be denied. They, for whom the act is ostensibly written and who are bound against their wishes by its operation, are not to be heard in such a proceeding even though their application is orderly made, even though they are the only persons seeking intervention, and even though they are the only ones who can assert a defense to the charge. Truly they have become, by practice and despite the intent of Congress, "a forgotten interest."¹ It is respectfully submitted that such arbitrary action, and such an established practice, is the equivalent of a denial to them of a due process of law, as guaranteed them by the Constitution.² This Court should require the Board and the appellate courts to establish a standard more in keeping with legis-

¹ Dissenting opinion of Mr. Justice Jackson in *N. L. R. B. v. Tower*, 91 L. Ed., 1. c. 251.

² See 33 Am. Bar Assn. Journal 516, May 1947 (column 3)—from paper of John Dickinson entitled "Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review."

lative intent and Constitutional guarantees. The Constitutional guarantees are familiar and have been in existence for more than 150 years. Congress has further expressed its legislative intent in this matter as recently as December 11, 1946 when the new Administrative Procedure Act [5 U. S. C. A.—Pocket Sup.—Sec. 1009 (e)] became effective. (This Act was not in effect at the time the instant case was briefed and argued in the court below.) Congress there authorized the courts to compel agency action unlawfully withheld where it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to Constitutional right, or in excess of statutory authority or short of statutory right.

The Board, and the Eighth Circuit Court of Appeals, have endeavored to justify denial of intervention in this case on the ground that the Petitioners had no interest in the case. Such a finding is contrary to fact and to the holdings of this Court. Actually, as pointed out in the Petition for Rehearing, when the Board and the Court rule the Union was validly designated the bargaining agent, the dissenting employees *instanter* lose their constitutionally retained rights to have a voice in deciding (1) their wages, (2) their hours of employment, (3) every other condition of their employment, and (4) how any grievance they may have may be settled. In addition to those lost rights, they may also lose, if the Company and the Union agree to it, their right to (5) stay out of the Union, (6) resign from the Union if they should join it, (7) refuse to pay Union dues, (8) get full pay without deduction of Union dues, (9) refuse to contribute to elect to public office candidates or political parties they oppose. About the only right left the dissenting employees is to "present a grievance" to their employer—and then they are not permitted to participate in its settlement.

The loss of these rights has been sustained on the ground that Congress, under the "Commerce Clause" in the Constitution, has authority to so legislate. But such construction runs afoul of the Ninth Amendment, which, by its terms, operates to prevent the Commerce Clause being so construed as to deny or disparage the certain rights, above enumerated, retained by the people, including the dissenting employees.

And for the Board to construe its discretion to deny intervention so that no dissenting employees are permitted to intervene in a case such as the one here certainly denies the dissenting employees (against whom the order of the Board designating the Union as bargaining agent effectively operates) that due process of law to which they are entitled.

2.

The National Labor Relations Act, Sec. 9, **29 U. S. C. A., Sec. 159 (a)**, provides that bargaining representatives shall be designated or selected "**by the majority of the employees IN A UNIT.**" The Board has construed this to mean by a majority of the valid votes cast; some of the Circuit Courts of Appeal have sustained this ruling. This Court has never passed on the question,³ but the clear language of the Act would require the bargaining representative to receive the votes of the "**majority of the employees in a unit.**" In the case here, only 59 votes were cast **for** the Union, and there were 129 employees in the unit involved. Congress, in the new labor bill, has made clear its intention that the bargaining representative should receive the votes of the majority of all the employees in the unit. Even Labor has admitted this was intended. Mr. Lee Pressman, General Counsel for the C. I. O., one of the two largest unions in this country, stated in an address he made be-

³ *N. L. R. B. v. Standard Lime*, 149 F. (2d), 1, c. 437.

fore the Forum on Labor Law at Omaha, Nebraska, on January 25, 1947 that "bona fide collective bargaining presumes that the union which is to be one of the contracting parties **must** be chosen by a majority of the employees **to be covered by the contract.**"⁴ His language is clear. The intent of Congress, expressed in the new bill after the strained interpretation of the present Act by the Board, is equally clear. It is respectfully submitted this Court should pass upon and construe this important provision of the present Act.

3.

If the Act is construed so that a bargaining representative need not receive the votes of "a majority of the employees" **in the unit**, then it is submitted the representative must receive a majority of all votes cast by qualified voters. In the case here 119 qualified employees voted—they were voting employees. This Court, in **N. L. R. B. v. Tower**, ... **U. S. ...**, **91 L. Ed. 245**, stated that there was an unfair labor practice **only** if the union was chosen by a **majority of the voting employees**. In the case here there were 119 voting employees, of which only 59 voted **for** the Union. It was unimportant how the other qualified voters cast their ballots: whether they voted against the Union, or voted for some other union, or for an individual, or voted to express an indifference to result, or wasted their ballot. The test under the **Tower** case would be, did a majority of the voting employees vote **for** the union? On this important point this Court has not clearly declared the law. These Petitioners interpret the **Tower** case to mean what they argue herein. If it does, then the Eighth Circuit has clearly misapplied the law. If not, then this Court should make the point clear.

⁴ 12 Mo. Law Review, l. c. 10.

4.

It is seldom that an election would be decided by one vote, but that has happened here. It nearly happened in the **Tower** case. It will probably happen again. For that reason it is important that standards be announced by which a doubtful ballot shall be judged. In the case here, even if the Board is correct on all else, there would still be no bargaining representative chosen if either the Fleming vote (R. 19) or the vote shown at Record page 21 should have been counted. Votes for "neither" were counted to secure a total in **N. L. R. B. v. Standard Lime, 149 F. (2d), 1. c. 439**. The ballot (R. 21) marked "Yes" and "No" is certainly a vote for neither the union nor the company. The Fleming ballot is reproduced in the Record at page 19. The Board has not counted the vote, and as authority therefor cites its own decisions in **Matter of Burlington Mills, 56 N. L. R. B. 365, 368** and **A. J. Tower, 60 N. L. R. B. 1414**. Those decisions make it clear the Board believes such matters are determined by its own rulings. The Eighth Circuit Court of Appeals seems to agree with this. These cases, however, dealt with a post-election challenge to the eligibility of a voter, whereas the point here is as to the validity of a vote cast by an admittedly eligible voter. Under the rule in Missouri, where the election was held, Fleming's vote was undoubtedly valid. The Board's Decision admits this is possibly so (R. 58-59). Should the rule of local law determine such questions? Several courts have held that the Act affects the substantive law of the states. The **Tower** case states the Board must give effect to the principle of majority rule "'sanctioned by our governmental practices, by business procedure and by the whole philosophy of democratic institutions.'" The voter in Missouri is presumably familiar with the voting rules in his home state, and those rules govern both in his

election of state and federal officers. If Congress should submit an amendment to the Constitution and provide for the organization of conventions in the various states, the state's election laws would determine the validity of votes cast for members of that convention. The rule of reason would call for the testing of a ballot in a labor election by the law of the forum. Certiorari should be granted to put at rest this important question in the administration of the Act.

5.

It is respectfully urged certiorari should issue so that these important questions in the administration of the Act may be determined, and the constitutionality of the Board's orders ascertained.

JOHN W. GIESECKE,
Attorney for Petitioners.

Of Counsel:

ACKERT, GIESECKE & WAUGH,
706 Chestnut Street,
St. Louis 1, Missouri.



INDEX

	Page
Opinion below.....	1
Jurisdiction.....	2
Questions presented.....	2
Statute involved.....	4
Statement.....	4
Argument.....	12
Conclusion.....	24
Appendix.....	25

TABLE OF AUTHORITIES

Cases:

<i>American Tobacco Co., Inc., Matter of</i> , 10 N. L. R. B. 1171.....	14
<i>Association of Clerical Employees of Atchison, Topeka & Santa Fe Railway System v. Brotherhood of Railway and Steamship Clerks</i> , 85 F. 2d 152.....	15
<i>Burlington Mills Corp., Matter of</i> , 56 N. L. R. B. 365.....	13
<i>Bussmann Mfg. Co. v. National Labor Relations Board</i> , 111 F. 2d 783.....	23
<i>Doepke v. King</i> , 132 Minn. 290.....	13
<i>Donlan v. Cooke</i> , 212 Iowa 771.....	13
<i>Elwell v. Comstock</i> , 99 Minn. 261.....	13
<i>Evening News Association, Matter of</i> , 42 N. L. R. B. 763.....	18
<i>Franks Bros. Co. v. National Labor Relations Board</i> , 321 U. S. 702.....	23
<i>Great Southern Trucking Co. v. National Labor Relations Board</i> , 139 F. 2d 984, certiorari denied, 322 U. S. 729.....	23
<i>International Association of Machinists v. National Labor Relations Board</i> , 311 U. S. 72.....	23
<i>Krakowski v. Waskey, et al.</i> , 33 S. D. 335.....	15
<i>Lane v. Otis</i> , 68 N. J. Law 64.....	15
<i>Marlin-Rockwell Corp. v. National Labor Relations Board</i> , 116 F. 2d 586, certiorari denied, 313 U. S. 594.....	14
<i>Murdoch v. Strange</i> , 99 Md. 89.....	15
<i>National Labor Relations Board v. Blount</i> , 131 F. 2d 585, certiorari denied, 318 U. S. 791.....	17
<i>National Labor Relations Board v. Central Dispensary and Emergency Hospital</i> , 145 F. 2d 852, certiorari denied, 324 U. S. 847.....	15
<i>National Labor Relations Board v. Hearst Publications, Inc.</i> , 322 U. S. 111.....	17
<i>National Labor Relations Board v. Hofmann</i> , 147 F. 2d 679, enforcing <i>Matter of O. U. Hofmann</i> , 55 N. L. R. B. 683.....	17

Cases—Continued

	Page
<i>National Labor Relations Board v. P. Lorillard Co.</i> , 314 U. S. 512	23
<i>National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.</i> , 303 U. S. 261	20, 21
<i>National Labor Relations Board v. Standard Lime and Stone Co.</i> , 149 F. 2d 435, certiorari denied, 326 U. S. 723	12, 14
<i>National Labor Relations Board v. A. J. Tower Co.</i> , 320 U. S. 324	13, 16, 22
<i>National Labor Relations Board v. Whittier Mills Co.</i> , 111 F. 2d 474	14
<i>National Licorice Co. v. National Labor Relations Board</i> , 309 U. S. 350	21
<i>New York Handkerchief Mfg. Co. v. National Labor Relations Board</i> , 114 F. 2d 144, certiorari denied, 311 U. S. 704	14
<i>Nicely v. Willey</i> , 210 Ind. 640	13
<i>People v. Town of Sausalito</i> , 106 Cal. 500	15
<i>Radio Corporation of America, Matter of</i> , 57 N. L. R. B. 1729	18
<i>Sorg Paper Co., Matter of</i> , 9 N. L. R. B. 136	14
<i>State v. Roper</i> , 47 Nebr. 417	15
<i>Swan v. Bowker</i> , 135 Nebr. 405	13
<i>Talbot v. Thompson</i> , 350 Ill. 86	13
<i>Village of Richwood v. Algower</i> , 95 Ohio St. 268	13
<i>Virginian Railway v. System Federation</i> , 300 U. S. 515	15

Statutes:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49

Stat. 449, 29 U. S. C. 151, *et seq.*):

Sec. 6	25
Sec. 7	25
Sec. 8 (1), (5)	25
Sec. 9 (a), (c)	25
Sec. 10 (b), (e), (f)	19, 26

Miscellaneous:

McCrary, <i>American Law of Elections</i> (4th Edition, 1897), p. 396	13
National Labor Relations Board, <i>Eighth Annual Report</i> (1943), p. 51	13
National Labor Relations Board, <i>Ninth Annual Report</i> (1944), pp. 32-33	14
National Labor Relations Board, Rules and Regulations (Series 3, effective November 26, 1943), Article III, Sec. 12	29

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 112

**BENJAMIN WEBER, JAMES ELLIS AND SIMON BIRK,
PETITIONERS**

v.

NATIONAL LABOR RELATIONS BOARD

No. 120

**SEMI-STEEL CASTING COMPANY OF ST. LOUIS, A
CORPORATION, PETITIONER**

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN
OPPOSITION**

OPINION BELOW

The opinion of the court below (Supp. 6-17)¹ is reported at 160 F. 2d 388. The findings of

¹The printed record for purposes of the petition for writ of certiorari consists of one volume into which have been bound (1) the printed "transcript of record" in the court

fact, conclusions of law, and order of the National Labor Relations Board (Pl. 56-82) are reported at 66 N. L. R. B. 713.

JURISDICTION

The decree of the court below (Supp. 17-20) was entered on April 26, 1947. Petitions for rehearing, filed by the Company² on March 28, 1947 (Supp. 21-31), and by the three employees on April 8, 1947 (Supp. 33-43), were denied on April 21, 1947 (Supp. 32, 45). The respective petitions for writs of certiorari were filed on June 6, 1947, in No. 112 and on June 10, 1947, in No. 120. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

In both Nos. 112 and 120

1. Whether two improperly marked ballots were lawfully treated by the National Labor Relations Board as void.

below which contains the pleadings and the decision and order of the Board, referred to herein as "Pl."; (2) the appendix filed by the petitioners in the court below, referred to herein as "P. A."; and (3) the supplemental proceedings in the court below, referred to herein as "Supp."

² For convenience, Semi-Steel Casting Company of St. Louis, petitioner in No. 120, will hereinafter be called the Company, and Benjamin Weber, James Ellis and Simon Birk, petitioners in No. 112, will hereinafter be called the three employees.

2. Whether the National Labor Relations Board may properly order an employer to bargain collectively with a labor organization when a majority of the valid ballots cast in an election were marked in its favor but, due to the spoiling of several ballots, the ballots marked in its favor did not constitute a majority of all ballots cast at the election.

3. Whether the Board was required to apply the law of the state where the election was held instead of its own uniform policy in determining the validity of ballots cast and their effect on the results of the election.

In only No. 112

4. Whether it was an abuse of discretion for the Board, in a proceeding against an employer for refusal to bargain collectively, to deny intervention to a group of employees who did not seek intervention or otherwise seek to participate in the election proceedings although they had adequate notice of such proceedings and who, in seeking to intervene in the unfair labor practice proceeding, raised no substantial issues as to the validity of the election other than those which the employer had raised in both the election and the unfair labor practice proceedings and which the Board determined on the merits in the unfair labor practice proceeding.

In only No. 120

5. Whether the Board, upon finding that an employer had refused to bargain collectively with a labor organization designated by a majority of the employees in an appropriate unit, may properly order the employer to bargain with that organization although prior to the issuance of the Board's order the labor organization, as the result of the employer's refusal to bargain, may have ceased to be the choice of a majority of the employees.

A further question urged by petitioner in No. 120 but which we think is not properly presented is

6. Whether an employer, by executing a consent election agreement, becomes bound by the regional director's rulings made under the terms thereof.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act and of the Rules and Regulations of the National Labor Relations Board are set forth in the Appendix, *infra*, pp. 25-30.

STATEMENT

During 1943, the Union³ conducted a campaign for the purpose of organizing the Company's employees (Pl. 70; P. A. 20, 31), and on or about

³ Local 59, International Molders and Foundry Workers of North America, A. F. of L. (Pl. 56).

October 15, 1943, filed with the Board (in a proceeding designated by the Board as Case No. 14-R-801) a petition for investigation and certification of representatives under Section 9 (c) of the Act (Pl. 70; 3-5). Two weeks later the Company and the Union entered into an agreement for a "consent" election, to be held on November 4, 1943, under the direction of the Board's regional director, for the purpose of determining whether the Company's employees in a stipulated unit desired to be represented by the Union (Pl. 57; P. A. 15, 20, 30, Pl. 5-9). The agreement provided that each party had the right to station observers at the polls to assist in the conduct of the election, challenge the eligibility of the voters, and verify the tally. The agreement further provided that (P. A. 15, Pl. 6):

Said election shall be held in accordance with the Act, the Rules and Regulations and the customary procedures and policies of the Board, *provided that the determination of the Regional Director shall be final and binding upon any question (including questions as to the eligibility of voters) raised by either party hereto relating in any manner to the election and not specifically covered in this agreement.* [Italics added.]

Approximately a week before the election the Board's regional director sent five large "Notice of Election" posters to the Company (Pl. 71; P. A. 64, 100, Pl. 23). These set out the rights

of the employees, the purpose of the election, the manner in which it would be conducted, those eligible to vote, the time and place of the election, and a sample ballot (P. A. 64, Pl. 23). One paragraph of the poster laid emphasis on the fact that the vote would be by secret ballot, and on the sample ballot there appeared the words "This is a secret ballot and must not be signed" (*ibid.*). These notices were posted about the premises by the Company (Pl. 71; P. A. 101-102).

On several occasions, Plant Manager Shanley (P. A. 88) was advised by Field Examiner Pierce (P. A. 56-57), the Board agent concerned with arrangements for this particular election, that the Company could answer questions as to the secrecy of the ballot (Pl. 77; P. A. 104). On the eve of the election Shanley held a meeting of the employees at which he told them how they should mark their ballots in order to comply with the published instructions (Pl. 77; P. A. 46, 96-97, 100). At the time of the election the Board's agent took great pains to acquaint all employees with the voting instructions (Pl. 75-77; P. A. 57-58, 67-68, 71-72, 98).

The balloting was duly conducted on November 4, the Company's observer being Tony Diguardi, the company bookkeeper (Pl. 71; P. A. 56). Following a tally of the vote, a "Certification on Conduct of Election" was signed by the representatives of the Company, the Union, and the

Board, certifying that the balloting had been held, that it was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote. (Pl. 71; P. A. 70-71, Pl. 17-18). After the ballots were counted, all parties signed a "Certification of Counting and Tabulation of the Ballots," attesting that the approximate number of eligible voters was 129, and that, of 119 ballots cast, 59 were cast for the Union, 58 against the Union, and the remaining two were void (Pl. 57, 71; P. A. 18, Pl. 15-16).

The ballot in this election was the standard form used in all Board elections. The lower half was ruled off with the instruction, "Mark an 'X' in the square of your choice" (Pl. 19). This was followed by the question, "Do you desire to be represented by International Molders and Foundry Workers Union of North America, Local #59, AFL?" Below this query there were two blank squares, one designated "Yes" and the other, "No" (*ibid.*). At the bottom of the ballot, in large capital letters, was the admonition, "THIS IS A SECRET BALLOT AND MUST NOT BE SIGNED" (*ibid.*). Of the two ballots which were rejected, one had been marked with an "X" in both the "Yes" and "No" squares (Pl. 58-59; P. A. 60-61, Pl. 21); the other had no marks in either square, but off to the right-

hand side near the "No" box George Flemings, a voter, had signed his name (Pl. 58-59; P. A. 60-61, Pl. 19).

On November 8, by letter to the regional director, the Company objected to the conduct of the election and to the determination of the results as certified by its own representative as well as those of the Union and the regional director (Pl. 57; 9-11). The three employees in Case No. 112 filed no objections of any kind (Pl. 61). Before the regional director and at the hearing in the subsequent complaint case which gave rise to this proceeding, the Company maintained that the election could not properly be regarded as determinative of the majority issue for the following reasons: (1) the ballot signed by George Flemings should have been counted as a vote against the Union, in which case the Union would have failed to obtain the requisite majority; (2) the 59 votes which the Union received were less than a majority either of the total number of employees in the appropriate unit or of the total number of employees who appeared and voted; (3) some 10 employees absent from the polls because of illness and for various other reasons should have been given an opportunity to vote; (4) the regional director failed adequately to instruct employees as to the mechanics of the voting and restrained the Company from doing so; (5) the regional director prevented the Company from

giving any opinions or information about the election to its employees during the pre-election campaign but permitted such privileges to the Union (Pl. 57, 72-73; P. A. 15-16, Pl. 9-11, 46-53). After a thorough investigation, the regional director overruled these contentions for want of merit (Pl. 57-58; P. A. 16-17, Pl. 11-15). Pursuant to the terms of the consent agreement, on November 23, he incorporated his findings and determination in an election report, in which he found that the objections were without merit and that the Union had been designated and selected by a majority of the employees in the unit agreed upon and was, therefore, the exclusive bargaining representative of all the employees in the unit (*ibid.*).

Thereafter, upon the refusal of the Company to recognize the Union as the bargaining representative of its employees (Pl. 58), the Union filed with the Board (in a proceeding designated by the Board as Case No. 14-C-916) a charge that the Company had violated the Act (P. A. 10, Pl. 25-26). A complaint was issued by the Board upon this charge and on May 1 and 2, 1944, a hearing was held before a trial examiner (Pl. 67-68). At the hearing five of the Company's employees (including the three now before this Court) filed a motion for leave to intervene (Pl. 60-62, 68-69, 38-43). In their motion the five employees alleged that their interest in the proceeding derived from the fact that, as members of

the appropriate unit, they were opposed to the Union as their collective bargaining agent and believed that a majority of the employees were similarly minded (Pl. 60-62; 38-39). Attached to the motion was a proposed answer to the complaint, setting forth the purposes for which intervention was being requested (Pl. 60-62; 40-43). After conceding the propriety of the unit, the answering allegations were briefly as follows: (1) that the employees who opposed the Union, including the movants, were not given an opportunity to have a representative on the "board of tellers" at the election; (2) that the two ballots rejected as void were votes against the Union and the Act required that they be so counted; (3) that the Act required the majority determination to be based either upon the number of all eligible voters or at least upon the total number of votes cast; (4) that the movants had formerly been members of the Union and that the Union had sought to enjoin them from withdrawing; (5) that the Union at a pre-election meeting, urged its members and other employees to vote for the Union; (6) that the principle of majority rule, which imposes upon all employees in the unit the bargaining agent chosen by a majority, contravenes the First, Fifth, Seventh, Ninth, and Tenth Amendments to the Constitution in that it deprives the minority group in the unit of their right to bargain individually with their employer. No other ground

for intervention was stated (*ibid.*); the facts which the Board regarded as pertinent to the disposition of the case were not disputed. On this showing of interest in the proceeding and of the purpose for which intervention was being sought, the trial examiner denied the motion (Pl. 60-62, 68-69).

On March 14, 1946, following the usual proceedings pursuant to Section 10 of the Act, the Board found that the Company had engaged and was engaging in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act by refusing to bargain collectively with the Union which the Board found had been designated in the consent election as the representative of the Company's employees (Pl. 56-82). It therefore ordered the Company to cease and desist from its unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (Pl. 62-63). The Board, with one member dissenting, sustained as proper the ruling of the trial examiner which denied intervention to the dissenting employees (Pl. 60-65).

The Company and the three employees filed in the court below their petitions to review and set aside the Board's order on April 8, 1946, and April 13, 1946, respectively (Pl. 83, 95). On March 13, 1947, the court handed down its opinion (Supp. 6-17) and on April 26, 1947, entered its decree (Supp. 17-20) sustaining the Board's

findings as to the unfair labor practices and enforcing the Board's order in full.

ARGUMENT

1. It is argued that the two ballots should not have been treated by the Board as void. That question does not present an issue warranting review by this Court. In any event, the Board's decision was justified.

The three employees (Pet. 17) argue that the ballot marked in both "Yes" and "No" squares should have been counted, asserting: "Votes for 'neither' were counted to secure a total" in *National Labor Relations Board v. Standard Lime & Stone Co.* (149 F. 2d 435, 439 (C. C. A. 4)), certiorari denied, 326 U. S. 723); on this ground they contend that there is a conflict between the opinion of the court below and that of the Fourth Circuit in the *Standard Lime* case. There is none whatsoever. In the latter case the printed ballot presented the employees with three choices: the A. F. of L., the United Mine Workers, or "Neither" as bargaining representative (149 F. 2d, at 436). That case offers no support for the argument made here that the voter who mutilated his ballot by marking it in both the "Yes" and "No" squares intended to cast a valid vote or to vote against the Union, and that therefore his ballot should be used in determining the total number of valid votes cast.

The Company argues (Pet. 25-32) that the

ballot which was signed by Flemings, although it contained no mark in either the "Yes" or "No" square, should have been counted as a vote against the Union because the signature was on the "No" side of the ballot. The Board ruled that Flemings' identification of his ballot in violation of the instruction printed thereon in large letters that the ballot should not be signed rendered the ballot void (Pl. 58-59), and also refused to allow Flemings to testify as to what he had intended. These rulings were proper, and in accord with the Board's uniform policy. *Matter of Burlington Mill Cop.*, 56 N. L. R. B. 365, 368; National Labor Relations Board, *Eighth Annual Report* (1943), p. 51. In *National Labor Relations Board v. A. J. Tower Co.*, 329 U. S. 324, this Court sustained the Board's policy of refusing to inquire into how employees voted in an election. And the prevailing view in political elections is that signed ballots may not be counted even if the voter's intention is ascertainable. McCrary, *American Law of Elections* (4th Edition, 1897), p. 396. See e. g., *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 698; *Doepke v. King*, 132 Minn. 290, 156 N. W. 125; *Donlan v. Cooke*, 212 Iowa 771, 237 N. W. 496; *Swan v. Bowker*, 135 Nebr. 405, 281 N. W. 891; *Talbott v. Thompson*, 350 Ill. 86, 182 N. E. 784; *Nicely v. Wildey*, 210 Ind. 640, 5 N. E. 2d 111; *Village of Richwood v. Algower*, 95 Ohio St. 268, 116 N. E. 462.

2. The Board's established practice of calculating election results on the basis of the number of valid votes cast (see e. g., *Matter of Sorg Paper Co.*, 9 N. L. R. B. 136, 137; *Matter of American Tobacco Co., Inc.*, 10 N. L. R. B. 1171, 1172; National Labor Relations Board, *Ninth Annual Report* (1944), pp. 32-33), derives from the Board's approved practice, prevailing also in political elections, of ascertaining the wishes of the majority from the actual preferences expressed at the election by the eligible voters.⁴ While no court other than the one below has had occasion to pass on the effect of spoiled ballots in a Board election, the courts have uniformly sustained the Board determination of majority on the basis of the total number voting rather than on the basis of the total number eligible to vote. *Marlin-Rockwell Corp. v. National Labor Relations Board*, 116 F. 2d 586, 588 (C. C. A. 2), certiorari denied, 313 U. S. 594; *National Labor Relations Board v. Standard Lime & Stone Co.*, 149 F. 2d 435, 438 (C. C. A. 4), certiorari denied, 326 U. S. 723; *National Labor Relations Board v. Whittier Mills*

⁴ The three employees assert that "Congress, in the new labor bill, has made clear its intention that the bargaining representative should receive the votes of the majority of all the employees in the unit" (Pet. 15). The Labor Management Relations Act of 1947 makes no change in the National Labor Relations Act in this regard.

Co., 111 F. 2d 474, 477-478 (C. C. A. 5); *New York Handkerchief Mfg. Co. v. National Labor Relations Board*, 114 F. 2d 144, 148-149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board v. Central Dispensary and Emergency Hospital*, 145 F. 2d 852, 853-854 (App. D. C.), certiorari denied, 324 U. S. 847. See also *Virginian Railway v. System Federation*, 300 U. S. 513, 560-561. Many State courts hold that spoiled ballots are not to be counted in determining the total number of votes to be used as the basis of determining the majority.⁵ It is apparent that if no effective choice has been made by a voter, his ballot represents no actual preference, cannot reasonably be classified as an affirmative or negative vote, and does not contribute to the general results of the election. It cannot and should not, therefore, be taken into account in determining the mathematical outcome of the election. To count the two spoiled ballots in the total would

⁵*People v. Town of Sausalito*, 106 Cal. 500, 503, 39 Pac. 937, 938; *Murdoch v. Strange*, 99 Md. 89, 107-112, 57 Atl. 628, 629-631; *State v. Roper*, 47 Nebr. 417, 419-426, 66 N. W. 539, 540-541; *Lane v. Otis*, 68 N. J. Law 64, 52 Atl. 305, 306; *Kraskowski v. Waskey, et al.*, 33 S. D. 335, 343-346, 145 N. W. 566, 568-570. And for a dictum that the same rule applies in elections under the Railway Labor Act, see *Association of Clerical Employees of Atchison, Topeka & Santa Fe Ry. System v. Brotherhood of Railway and Steamship Clerks*, 85 F. 2d 152, 157 (C. C. A. 7).

have the effect of treating them as votes against the Union, even though they could not reasonably be considered as such.

The three employees assert (Pet. 5, 7, 16) that the decision of the court below fails to apply the rules laid down by this Court in *National Labor Relations Board v. A. J. Tower Co.*, 329 U. S. 324. They argue that in the latter case this Court held that the test of a majority is made on the basis of the voting employees, including, therefore, those who cast spoiled ballots. We submit that the holding of the *Tower* case is subject to no such construction. To support their assertion the three employees have been compelled to take from its context a single sentence from that opinion wherein this Court stated (329 U. S. at 333):

It is true that it is an unfair labor practice for an employer to refuse to bargain with a union only if that union was chosen by a majority of the voting employees.

Yet the only permissible construction of this sentence from the opinion becomes clear when it is read with the very next portion of the paragraph which follows it, viz.:

But the determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion. The rule prohibiting post-election challenges is one of those rules. [Italics added].

Here, as the court below pointed out (Supp. 12-14), the rule of the Board requiring that only the valid votes cast be counted is another such rule. We submit, therefore, that the holding of the court below is neither directly nor indirectly in conflict with the *Tower* case.

3. The Board's application of one uniform policy as to elections irrespective of where they are held and its refusal to follow the law of the State where the election is held in respect to spoiled ballots or the determination of majority was clearly correct. This Court has previously recognized the unworkability of applying the differing rules of local law to problems arising under the Act. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 123-124. *Cf. National Labor Relations Board v. Blount*, 131 F. 2d 585, 590 (C. C. A. 8), certiorari denied, 318 U. S. 791; *National Labor Relations Board v. Hofmann*, 147 F. 2d 679 (C. C. A. 3), enforcing *Matter of O. U. Hofmann*, 55 N. L. R. B. 683. Certainly in respect to the manner of conducting elections, which often cover units embracing employees in several States, the application of the varying local state laws relating to political elections would be entirely unfeasible.

4. The three employees contend (p. 6, 13-15) that the Board erred in denying their petition to intervene.

The Board did not, as these petitioners assert, hold that they "had no interest in this case" (Pet.

p. 14).⁶ On the contrary, the Board found that the trial examiner's denial of the application to intervene was not prejudicial because the same contentions had been raised by the company and rejected on the merits by the Board (Pl. 61).⁷ As the court below stated in this connection (Supp. 16-17):

Insofar as intervention was sought by the employees for the purpose of making the same defense as that made by the company, they were not only not necessary parties, but their presence could only serve to hinder and delay the prompt decision of the controversy. They make no showing that they could have adduced evidence other than that offered by the company.

There is no merit in the claim that they were entitled as of right to have an observer at the election as a special representative of those employees who were opposed to the union. Whether either the company or the union or the employees opposed to the union are represented at the polls by

⁶ The Board has permitted employees to intervene in *Matter of Evening News Association*, 42 N. L. R. B. 763, 764, and *Matter of Radio Corporation of America*, 57 N. L. R. B. 1729.

⁷ The proposed answer of the intervenors (Pl. 40-43) did not contradict the basic facts upon which the case was decided. The contentions raised by the intervenors were the same as those raised by the company, except perhaps for their claim, considered by the court below in the passage quoted in the text, that they were not represented by a separate observer at the election.

observers is a matter exclusively within the discretion of the Board. None of the intervening employees requested representation by observers before the election. They had the same notice of the election as other employees and the same opportunity to vote. Nothing in the petition for leave to intervene or in the answer tendered with it tends to show that the Board's agents failed in their duty to conduct a fair election, or that the complaining employees were prejudiced by lack of representation, or that the election did not result in the choice of a bargaining representative by the majority of those employees in the union who availed themselves of the privilege of attending the election and casting their ballots.

Section 10 of the Act, prescribing the procedure for the prosecution of unfair labor practice cases, empowers the Board to issue its complaint and direct its order only against a person charged with having committed unfair labor practices. Any person so complained of is expressly given the right by the statute to file an answer to the complaint and to appear in the proceeding and give testimony. No other person is entitled to be made a party; others may "in the discretion" of the Board or its agent conducting the hearing, be permitted to intervene in an unfair labor practice proceeding and give testimony. It is thus apparent that the statute deems to be indispensable parties only those persons whose presence in the

proceeding is essential to the joinder of issue on the alleged unfair labor practices and who would be subject to the Board's order. This Court has so interpreted the statute. *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271.

The proceeding in which these three employees sought to intervene was instituted by the Board under Section 10 of the Act solely against the Company, whom it charged with having committed an unfair labor practice by refusing to bargain with the Union for the employees in the appropriate unit (Pl. 26-29). And it was against the Company alone that the Board's order would, and did, run (Pl. 62-63). The three employees were not named in the complaint, and no portion of the Board's order is directed to them (Pl. 26-29, 62-63). By the clear meaning of the statute and the interpretation which this Court has placed upon it, the three employees were not indispensable parties to the proceeding and their presence was not affirmatively necessary to the Board's jurisdiction to issue the order here in question.

Nor does the fact that the ordinary right of the three employees to bargain individually with their employer was at stake in the unfair labor practice proceeding make them indispensable parties without whom the Board could not validly enter its bargaining order against the Company.

It is well established that the adverse effect which an unfair labor practice proceeding may have upon individual private rights imposes no requirement for joining as indispensable parties the individuals so affected. This Court so held in *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, where it sustained as valid a Board order directing the employer to cease giving effect to individual contracts of employment found to be the product of unfair labor practices, even though the individuals affected had not been joined as parties and had not been given an opportunity to be heard. In consonance with this view, this Court had earlier held that a union charged with being company-dominated was not an indispensable party to an unfair labor practice proceeding against the employer, even though the Board's order directed the employer completely to disestablish the union. *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271. -

The employee-petitioners claim, however, that the company was estopped by its agreement to the consent election from asserting that the Union was not the lawful bargaining agent, and that therefore only the employees opposing the Union could protect their interests. But in fact the company there raised all the substantive objections urged by the employee-petitioners, both before the Board, the court below, and this Court.

And the Board has passed upon the merits of the contentions without reference to the principle of estoppel (Pl. 57-60). Thus, in this case, as in the *Tower* case, even though the Board's rulings on the employer's objections to the election were made on review of the regional director's conduct, the terms of the consent-election agreement and the rule of review used in consent-election cases are irrelevant to the issue of the propriety of the established substantive policy on which the Board relied in making its rulings. If that policy was reasonable and valid, and we submit that it was, then the three employees were not prejudiced even though they were not parties to the consent-election agreement.

5. The Company objects to the Board's affirmative bargaining order on the ground that, by reason of a turn-over in personnel since the refusal to bargain, the Union has probably lost its majority designation (Pet. 33-34). The Company submitted no proof of actual loss of majority, and the Board found (Pl. 60) as to this speculative basis of opposition to its order that "any loss in the Union's majority status was attributable to the respondent's [Company's] unlawful refusal to bargain." It is well settled that dissipation of the majority following an unlawful refusal to bargain in no way affects the validity of the Board's bargaining order, for the Board may properly assume, as it did in this case, that

the loss of majority occurred by reason of the wrongful refusal to bargain. *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 703-706; *International Association of Machinists v. National Labor Relations Board*, 311 U. S. 72, 81-83; *National Labor Relations Board v. P. Lorillard Co.*, 314 U. S. 512, 513; *Bussmann Mfg. Co. v. National Labor Relations Board*, 111 F. 2d 783, 788 (C. C. A. 8); *Great Southern Trucking Co. v. National Labor Relations Board*, 139 F. 2d 984, 985-986 (on contempt) (C. C. A. 4), certiorari denied, 322 U. S. 729.

6. The question of whether the Board may properly treat the Company as bound by the regional director's rulings by reason of its having signed a consent election agreement, which the Company urges (Pet. 10), is not here presented because the Board did not rest its decision on the ground that the Company was so bound. Instead the Board determined each of the issues presented on the merits (Pl. 58-60).

CONCLUSION

The decision of the court below is correct and there is neither a conflict of decision nor any important question warranting review. The petitions for writs of certiorari should therefore be denied.

Respectfully submitted,

✓ GEORGE T. WASHINGTON,

Acting Solicitor General.

✓ GERHARD P. VAN ARKEL,

General Counsel,

✓ MORRIS P. GLUSHIEN,

Associate General Counsel,

✓ RUTH WEYAND,

✓ ROBERT E. MULLIN,

Attorneys,

National Labor Relations Board.

JULY 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 et seq.) are as follows:

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of

employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * *

SEC. 10.

* * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so

complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testi-

mony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in

part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * * * *

The pertinent provisions of the Rules and Regulations of the National Labor Relations Board (Series 3, effective November 26, 1943) are as follows:

ARTICLE III

SEC. 12.

Hearing waived by stipulation; consent election agreements; consent cross-check agreements. * * *

After a petition has been filed and it appears to the Regional Director that an investigation should be instituted, the parties and any known individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into a consent election agreement or consent cross-check agreement leading to a statement by the Regional Director of the facts ascertained after such consent election or cross check but not resulting in a certification by the Board under Section 9 (c) of the Act. Such agreement shall include a determination of the appropriate unit, the time and place of holding the election, and the pay roll to be used in determining what employees within the appropriate unit shall be eligible to vote or to be counted. Such consent election or consent cross-check shall be conducted under the direction and supervision of the Regional Director.

The method of conducting such consent election shall be consistent with the method followed by the Regional Director in con-

ducting elections directed by the Board, pursuant to Section 9, Article III, of these Rules and Regulations, except that the rulings of the Regional Director shall be final, and the statement by the Regional Director of the results thereof shall be final. The method of conducting such consent cross check shall be set forth in the consent cross-check agreement. The rulings of the Regional Director on all matters shall be final, and the statement by the Regional Director of the results thereof shall be final.

